UDHAYAKUMAR VADIVELU

v.

CHIN KON TAI

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 227 OF 1979]
18 FEBRUARY 1985

TORT: *Negligence - Liability - Motor accident - Personal injuries - Whether defendant liable - Whether there was contributory negligence.*

The 1st plaintiff, a pillion rider of a motor cycle, sustained injuries as a result of being involved in a collision with a motor car. The collision occurred at a bend on the road between Labu and Seremban. Both the plaintiff and the defendant blamed each other for encroaching onto the path of each other. The rider of the motor cycle, though injured, did not take action against the defendant nor did he give evidence at the trial.

Held:

[1] What is done or omitted to be done in the agony of the moment when exposed to danger by the wrongful act of another, cannot be fairly treated as negligence, per Raja Azlan Shah J (as he then was). Both the car and the motor cycle were negotiating a sharp bend from the opposite direction of each other, and the accident took place very suddenly.

[2] No contributory negligence attributable to the defendant. At the time of the accident, the rider of the motor cycle, while negotiating a sharp bend, lost control of his motor cycle which then slided across the road in the course of falling onto the path of the car which was on its correct side travelling at moderate speed.

[Plaintiffs' claim dismissed with costs. Judgment for defendant.]

Case referred to:
Govinda Raju v. Laws [1966] 1 MLJ 188

For the plaintiffs - V. Balasingam; M/s. Joseph & Son
For the defendant - Chew Kar Teng; M/s. Chew & Co.

JUDGMENT

Peh Swee Chin J:

To recapitulate the facts of this case, on the day of the accident, the 1st plaintiff was a pillion rider of a motor cycle driven by another person, not a party in this case nor was he called as a witness. At about 3.10 p.m. the motor cycle which was driven from the direction of Labu to the direction of Seremban met with an accident. This is substantially what the 1st plaintiff said. The motor cycle took a bend, and the defendant's motor car, coming from the opposite direction, while negotiating the bend encroached onto the path of the motor cycle and knocked into the plaintiff. The plaintiff was 70 to 80 ft away from the car when the latter was first seen. The car encroached onto his path by about ½ ft to 1 ft from the centre white line and at the time the motor cycle was about 1 to 2 ft from the centre line. He was unconscious for 10 days.

In cross-examination, the plaintiff said the three doctors who examined him could have made a mistake about his being conscious. He maintained he saw the car coming fast, encroaching onto his path and knocking into him. The accident took place very fast in about two seconds. The road was going downhill towards Seremban and the rider was a good friend of his and about 20 to 21 years of age. They were going to a coffee shop. The motor cycle was travelling slowly between 20 to 30 miles per hour. When the motor cycle negotiated the bend the motor cycle was about 1 to 2 ft from the centre white line on its correct side of the road. The motor cycle was travelling close to the centre line for about 30 to 35 ft and before that, the motor cycle was on the side of the road and the rider of the motor cycle decided to come near the centre of the road. He did not know why the rider did so. He denied that the motor cycle at the time of the accident, fell by itself and it slided across the road giving no chance to the defendant to avoid it. He did not know why the rider who was injured had not taken action against the defendant. He said he was called by the police to give evidence about this accident but did not know whether the rider of the motor cycle was charged.

The defendant, aged 50, gave evidence to the effect as follows. It was not raining that day and the bend at 2½ m.s. i.e., the scene of the accident, was a sharp right-hand bend and he was travelling at about 30 miles per hour. The motor cycle encroached onto his path; knocked into him and at the time he was on his correct side of the road. He swerved to his left. When the motor cycle was coming towards him, it was in the course of falling down and it came and knocked into the front left part of his car. When the motor cycle came into contact with his car, his car was already on the grass verge. The line marked 'N' on the sketch plan was made by the motor cycle and he was going uphill. He was not charged by the police neither had the rider made a claim against him.

In cross-examination, the defendant said, he was at a distance of 40 ft (as pointed out and estimated) from the motor cycle. The motor cycle was in the course of falling down and he applied his brakes, but he did so slowly. After that, he did jam his brakes but then the motor cycle had already come into contact with his car. After he jammed his brakes, the car did not move. The defendant demonstrated with toy cars a collision at the grass verge. At this stage, the Court referred him to the sketch plan showing his car to have been found well away from the grass verge on the metalled road. He explained that after the collision he had reversed his car because he saw smoke coming out from his car. He reversed onto the metalled road for a distance pointed out by the defendant and estimated to be about 10 ft. Before so reversing, the motor cycle was attached to his car but when he reversed the motor cycle was not dragged along. The rider and pillion rider of the motor cycle were on the grass verge. The impact was not in the centre of the road.

When re-examined, the defendant said he could not avoid the motor cycle because the latter came suddenly to his path. He did not encroach onto the path of the motor cycle.

From the evidence set out above, both the plaintiff and defendant blamed each other for encroaching onto the path of each other. I saw defendant give evidence without betraying any symptoms indicative of evasions or shiftiness. He impressed me as a witness of truth while the plaintiff appeared to be so symptomatic. To give a few examples, the plaintiff would even maintain that the three doctors had made a mistake about him being conscious. He was called by the police to give evidence in Court about the accident, (the evidence at that stage was not objected to by Counsel for plaintiff), he did not know whether the rider of the motor cycle was charged. A subpoena issued at the instance of the police will always show who is charged.

My impression about the plaintiff being an untruthful witness remained unimpaired when I tested his evidence against the sketch plan which threw light on the accident in such an illuminating way a sketch plan has seldom done before. The sketch plan showed a pool of glass fragments over the centre of the road, but mostly on the defendant's correct side of the road. It showed a broken straight line emanating from the left edge of the road of the plaintiff to the right edge of the road, crossing another line while it was near such right edge of the road. The motor cycle was found almost completely on the grass verge with another broken straight line between the motor cycle and the front off-side of the car found on the metalled road.

The defendant said the motor cycle was on the grass verge after the accident, so it was. He said he reversed his car from the motor cycle on to the metalled road for about 10 ft so he did, but the line "L M" showed he had reversed for 42 ft in fact. I would say that if he said he had reversed for 42 ft then he would have been coached to say so with the sketch plan in mind. The glass fragments were in the middle but mostly on the correct side of the defendant, and this, the learned Counsel for the plaintiff submitted, showed the accident to have taken place in the middle of the road. The reality of the situation should not have been lost sight of. One half of the road was only 8 ft and the glass fragments, when they became such glass fragments, on impact, would have the tendency of flying off and not dropping perpendicularly down there and then. The broken straight line marked 'N' would bear out the story of the defendant that the plaintiff's motor cycle, at the bend, slided across the road in the course of falling, onto the path of the defendant. The line 'N' would explain that bit of evidence from plaintiff, which emerged from cross-examination i.e. that the motor cycle swerved to the centre of the road from the side of the road, and was travelling for about 30 to 35 ft close to the centre of the road for about 1 - 2 ft from the white line. This strange behaviour of the motor cycle was thus explained by the defendant whose evidence on this point was reinforced by the line 'N'. The accident took place very suddenly and in about two seconds while the plaintiff was so close to the defendant, that defendant truly faced an emergency of the kind which not every motorist has the misfortune of encountering, i.e. the motor cycle had slided across the road, in the course of falling, into the path of the defendant, such that it would not be right or fair to say that the motorist should have jammed his brakes on seeing that happening, instead of applying his brakes slowly. Who could normally have foreseen such an unexpected course the motor cycle took? A glance at the table of braking distances would show that travelling at 30 m.p.h. at which the defendant said he was travelling, the braking distance would be 50 ft and reaction distance 44 ft giving an overall stopping distance of 95 ft. Even jamming his brakes would have made no difference to the unavoidable accident. Again what is done or omitted to be done in the agony of the moment when exposed to danger by the wrongful act of another, cannot be fairly treated as negligence, per Raja Azlan Shah J (as he then was) in *Govinda Raju v. Laws* [1966] 1 MLJ 188.

I therefore found that both the car and the motor cycle were negotiating a sharp bend with the motor cycle travelling downhill, from the opposite direction of each other. I further found that the motor cycle was travelling at speed with the rider losing control of the motor cycle which then slided across the road in the course of falling onto the path of the car which was on its correct side travelling at moderate speed. I found that the point of impact was where line "N" crossed the line "LM", and not in the middle of the road as suggested by Counsel for plaintiffs. On a stringent and critical review of the evidence, I found nothing in the nature of contributory negligence attributable to the defendant.

I therefore felt compelled to dismiss the plaintiffs' claim with costs. If the plaintiffs i.e. the infant plaintiff and his father and next friend had succeeded I would have assessed, on the basis of assumed 100% liability and after taking into account of overlapping effect, damages as follows:

1) RM25,000 for and in connection with loss of sight of one eye;

2) RM3,500 for fracture of nasal bones and connected lacerations;

3) RM1,000 for other abrasions and lacerations; and

4) RM5,000 for comminuted fracture of left tibia.

I would not have awarded any loss of earnings. The accident took place on 5 October 1978 and the 1st plaintiff appears to have missed his Form III (LCE) examination on 10 October 1978, which he took the following year and failed. It appears he never worked but stayed in school for three more years for he made two more attempts to sit for the same examination. He appeared to be a drop-out. He has a good pair of hands, and his left tibia has apparently healed without any residual disability, for which there was no evidence. He would not have the slightest difficulty in getting a job in one of the numerous plantations and construction sites surrounding Seremban if he had condescended to such jobs, which have nothing to make any such worker ashamed of himself.

I therefore gave judgment for the defendant for the reasons stated above.

Also found at [1985] 1 CLJ 390